

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**



1206

75-7270 JB

JUN 3 1975

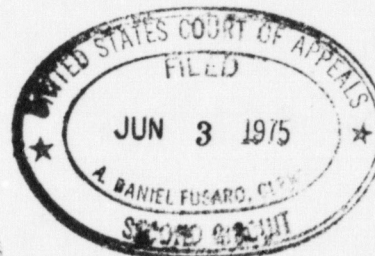
UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

CHARLES MERRILL MOUNT,  
Plaintiff,

-against-

ALLEN HERBERT ARROW, MICHAEL WARD  
STOUT, & JANICE LEACH,  
Defendants.

Docket No. 75-7270



APPENDIX

of the appellant

CHARLES MERRILL MOUNT

PAGINATION AS IN ORIGINAL COPY



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PART ONE



JUDGE CANNELLA

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PLAINTIFFS

CHARLES MERRILL MOUNT

DEFENDANTS

CANNELLA

ALLEN HERBERT ARROW,  
MICHAEL WARD, STOUT, AND  
JANICE LEACH.

J.N.

CAUSE

ILLEGAL REMOVAL OF PLTF'S FOUR MINOR CHILDREN FROM THIS COUNTRY TO FURTHER A CONSPIRACY  
TO ROB AND DEFRAUD PLTF. U.S.C. 18 SECS 1341 and 1343.

ATTORNEYS

PRO SE.

CHARLES M. MOUNT  
135 BEACH 145 Street,  
Neponsit, New York, 11694  
(212) 474-1188

FILING FEES PAID		STATISTICAL	
CASE NUMBER	CD NUMBER	CARD	DATE
145430		JS-5	✓
		JS-6	

DATE	NR.	PROCEEDINGS
01-14-75		Filed Complaint, Issued Summons.
02-05-75		Filed plttf's affdvt. in support of motion for summary judgment.
02-5-75		Filed affdvt. of Charles Merrill Mount dtd. 2-3-75.
02-5-75		Filed plttf's memorandum in support of motion for summary judgment.
02-07-75		Filed Amended Complaint
02-21-75		Filed summons and return-served the following: Allen Herbert Arrow, personally, on 01-16-75 Michael Ward Stout, personally, on 02-18-75 Janice Leach- UNEXECUTED- 01-16-75
02-21-75		Filed Amended summons and return- served the following: Allen Herbert Arrow, personally, on 02-13-75 Michael Ward Stout, personally, on 02-18-75
03-03-75		Filed plttf's affdvt. requesting emergency consideration.
03-03-75		Filed plttf's affdvt. in opposition to defts. Arrow & Stout motion to dismiss.
03-04-75		Filed Affidavit & Notice of Motion by defts Arrow & Stout for an order dismissing the complaint on the grounds of lack of subject matter jurisdiction, etc, as indicated, rtble bef ore Cannella, J. on 3-7-75.
03-04-75		Filed memorandum of law submitted by defts Arrow & Stout in support of their motion to dismiss the complaint.
04-02-75		Filed Memorandum Decision- OPINION # 42162 and Order- for the reasons stated, the defts' motion to dismiss the complaint is granted and the plttf's motion for summary judgment is denied. The Clerk of the Court is directed to enter judgment dismissing the complaint as to all defts. It is so ordered- CANNELLA, J. (m/n)
04-03-75	✓	Filed Judgment- ordered that defts. have judgment against plttf. dismissing the complaint as to all defts. Clerk (m/n)
04-08-75		Filed plttf's affdvt. in support of motion to proceed on appeal in forma pauperis.
04-14-75		Filed memo endorsed on affdvt. filed 04-08-75. For the reason stated, plttf. is hereby granted leave to appeal in forma pauperis. So ordered- CANNELLA, J.
04-23-75		Filed plttf's notice of appeal from decision and order dismissing the complaint on 4-2-75. Notices mailed by Pro Se Clerk. Entered- 4-23-75
05-07-75		Filed notice that the record on appeal has been certified and transmitted to the USCA on 05-07-75.



PART TWO



order & Affidavits  
791-0113

Approved & Accepted 4/23

pro se clerk

791-0165

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- X  
CHARLES MERRILL MOUNT,

Plaintiff,

-against-

ALLEN HERBERT ARROW, MICHAEL WARD  
STOUT and JANICE LEACH,

Defendants.

:  
75 Civ. 173  
(JMC)

:  
Pro se

----- X  
MEMORANDUM DECISION AND ORDER

CANNELLA, D.J.:

This action is presently before the Court upon plaintiff's motion for summary judgment pursuant to Fed. R.Civ.P. 56(a) and upon defendants' motion to dismiss the complaint for lack of jurisdiction over the subject matter of the action, Fed.R.Civ.P. 12(b)(1), and for failure to state a claim upon which relief can be granted, Fed.R.Civ.P. 12(b)(5).<sup>1/</sup> For the reasons herein-  
after stated, the plaintiff's motion is denied and the defendants' motion is granted.<sup>2/</sup>

The instant action is one of several commenced in this district by Charles Merrill Mount in which he alleges various and sundry nefarious, conspiratorial and

illegal acts by numerous individuals against his person, family and property. As framed in plaintiff's own words, "this is an action to recover damages from my own cousin and attorney, and his professional associates, for having conspired together fraudulently to deprive me of personal property stolen from my house at 42, Ailesbury Road, Dublin, Ireland, the means of this fraud being that the defendants first secreted and then conspired to transport out of this jurisdiction and this country without my knowledge, my lawful wife Sarah Mount, and my four minor children." (Affidavit of Charles Merrill Mount dated February 3, 1975 at 1-2.) In seeking relief for these alleged wrongs, plaintiff premises federal jurisdiction upon the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and 18 U.S.C. §§ 1341 and 1343 under which provisions his claims purportedly arise, as well as upon the fact that "the matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars." (Amended Complaint ¶ 1.)

#### SUBJECT MATTER JURISDICTION

In opposing the instant motion to dismiss, Mr. Mount argues that because of the fact that he has



alleged a controversy involving an amount in excess of \$10,000 the Court is properly possessed of jurisdiction and his complaint should not be dismissed. In adopting this view, plaintiff operates from an apparent confusion with regard to the amount in controversy requirement of the jurisdictional statutes. The \$10,000 requirement contained in both the diversity of citizenship statute, 28 U.S.C. § 1332, and the federal question statute, 28 U.S.C. § 1331, is but half of the necessary jurisdictional predicate. As regards jurisdiction premised upon diversity of citizenship, in addition to a claim in excess of \$10,000, absolute diversity must exist between the plaintiff and all defendants. Strawbridge v. Curtiss, 7 U.S. 267 (1806); C. Wright, Law of Federal Courts §§ 23 and 24 (2 ed. 1970). Under the federal question statute, an excess of \$10,000 in controversy and a claim which "arises under the Constitution, laws, or treaties of the United States" must be alleged.

With regard to the instant case, it is clear that no complete diversity of citizenship between the parties exists (see, Affidavits of Allen H. Arrow and Michael Ward Stout dated February 12, 1975), and plaintiff has apparently not so premised his action. As to the viability of federal question jurisdiction, plaintiff asserts

that his claims arise under the Fourth, Fifth and Fourteenth Amendments to the Constitution and certain federal criminal statutes, hence under the Constitution and laws of the United States. Thus, having also alleged that a sum in excess of \$10,000 is in controversy, Mount has satisfied the requirements of § 1331. See, e.g., Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971); Bell v. Hood, 327 U.S. 678, 681-85 (1946); Brault v. Town of Milton, \_\_\_\_ F.2d \_\_\_\_, No. 74-2370 (2 Cir. Feb. 24, 1975) (slip op. at 1871-1874); Note, Implying Civil Remedies from Federal Regulatory Statutes, 77 Harv L. Rev. 285, 287-89 (1963). We therefore conclude that plaintiff has properly invoked the subject matter jurisdiction of this Court under 28 U.S.C. § 1331. However, as is demonstrated below, we further conclude that plaintiff has failed to state a claim upon which relief might be granted.

IS A FEDERALLY COGNIZ-  
ABLE CLAIM PRESENTED?

Each of the defendants named herein is a private individual and not an official or agent of any governmental entity. The fact that Messrs. Arrow and Stout are attorneys,



hence officers of the court, does not deprive their conduct of its otherwise private nature and render it "under color of law." See, e.g., Page v. Sharpe, 487 F.2d 567, 569-70 (1 Cir. 1973); Lefcourt v. Legal Aid Society, 445 F.2d 1150 (2 Cir. 1971). It is axiomatic beyond the need of extended discussion that wholly private conduct (the absence of any alleged governmental action) is without the restrictions of the Fourth, Fifth and Fourteenth Amendments and, therefore, that plaintiff can have no relief upon the claims which he asserts under those Constitutional mandates. See, Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, supra, 403 U.S. at 392; New York City Jaycees, Inc. v. United States Jaycees, Inc., \_\_\_\_\_ F.2d \_\_\_\_\_, No. 74-1916 (2 Cir. March 7, 1975 (slip op. at 2101) ("private action is immune from the restrictions of the Fifth and Fourteenth Amendments."); Landowners Consideration Assn. v. Montana Power Co., 300 F.Supp. 54, 57 (D. Mont. 1969), appeal dismissed, 439 F.2d 722 (9 Cir. 1971); Bell v. Hood, 71 F.Supp. 813, 816 (S.D. Cal. 1947); cf., Lonecassion v. Leekity, 334 F.Supp. 370, 374 (D. N.M. 1971). See also, Jackson v. Metropolitan Edison Co., \_\_\_\_\_ U.S. \_\_\_\_\_, 43 U.S.L.W. 4110 (1974) (state action



in § 1983 context).

Turning then to plaintiff's assertions under 18 U.S.C. §§ 1341 and 1343, we similarly find that Mount has failed to state claims upon which relief is cognizable. § 1341 is the federal mail fraud statute and § 1343 concerns frauds and schemes to defraud involving the use of wire, radio or telephone communications in interstate or foreign commerce. With regard to § 1341, the Supreme Court has made clear that the statute's purpose is to prevent the Post Office from being used to carry fraudulent schemes into effect. Parr v. United States, 363 U.S. 370, 389 (1960). As the Court of Appeals for the Eighth Circuit has more recently stated:

The purpose of 18 U.S.C. § 1341 is to prevent the Postal Service from being used to carry out fraudulent schemes, regardless of what is the exact nature of the scheme and regardless of whether it happens to be forbidden by state law.

United States v. States, 488 F.2d 761, 767 (1973), cert. denied, 417 U.S. 909 (1974). See also, United States v. Cashin, 281 F.2d 669, 674 (2 Cir. 1960). Similarly, with regard to § 1343 the congressional purpose is clear. The statute is designed to prevent wire, radio and

television facilities from being employed as vehicles of transmission for criminal schemes to defraud, a purpose identical to that which § 1341 serves with regard to the mails. As is more fully developed infra, the purpose of these statutes and the harm which they are designed to prevent make it readily apparent that they are ill-suited to serve as basis for an implied civil cause of action for the benefit of private litigants.

It has long been recognized

that a penal statute can give rise to a civil cause of action (1) where criminal liability was inadequate to insure the full effectiveness of the statute which Congress had intended, (2) where the interest of the plaintiffs falls within the class of interests that the statute was intended to protect, and (3) where the alleged harm that had occurred was of the type that the statute was intended to forestall.

National Ass'n for Community Development v. Hodgson, 356 F.Supp. 1399, 1403 (D. D.C. 1973) (and the cases there cited at pp. 1402-03). Accord, Wyandotte Co. v. United States, 389 U.S. 191, 202 (1967); J.I. Case Co. v. Borak, 377 U.S. 426, 431-34 (1964); Stewart v. Travelers Corp., 503 F.2d 108, 109-114 (9 Cir. 1974); Ash v. Cort, 496 F.2d 416, 421-24 (3 Cir. 1974), cert. granted, \_\_\_\_ U.S. \_\_\_\_, 43 U.S.L.W. 3279 (U.S. Nov. 11, 1974) (No. 73-1908); Burke v. Compania Mexicana de Aviacion, 433 F.2d 1031, 1033-34 (9 Cir. 1970); United States v. Perma Paving Co., 332 F.2d



754, 758 (2 Cir. 1964); River v. Richmond Metropolitan Authority, 359 F.Supp. 611, 638-39 (E.D. Va.), aff'd, 481 F.2d 1280 (4 Cir. 1973) (per curiam); Ash v. Cort, 350 F.Supp. 227, 231 (E.D. Pa. 1972), aff'd, 471 F.2d 811 (3 Cir. 1973); Fullerton v. Monongahela Connecting R.R. Co., 242 F.Supp. 622, 625 (W.D. Pa. 1965); cf., National R.R. Passenger Corp. v. National Assn. of R.R. Passengers, 414 U.S. 453 (1974); compare, Gerbing v. I.T.T. Rayonier, Inc., 332 F.Supp. 309, 310 (N.D. Fla. 1971); Bass Angler Sportsmen's Society v. Scholze Tannery, Inc., 329 F.Supp. 339, 345 (E.D. Pa. 1971); Bass Angler Sportsmen Society v. United States Steel Corp., 324 F.Supp. 412, 415 (N.D. Ala.), aff'd, 447 F.2d 1304 (5 Cir. 1971) (per curiam). See also, Note, The Phenomenon of Implied Private Actions Under Federal Statutes: Judicial Insight, Legislative Oversight or Legislation by the Judiciary, 43 Fordham L. Rev. 441 (1974); Note, 77 Harv. L. Rev. 285, supra. To put the above-stated standard concerning the implication of civil remedies from penal statutes in other terms:

The tests, in order of importance, are (1) whether the legislative history of the statute and the remedial provisions in the statute taken alone and in relation to other sections and other acts

demonstrate a clear expression of legislative intent respecting private action; (2) whether a private action would further the purposes of the statute; (3) whether the statutory remedies have been adequately enforced; and (4) whether the plaintiff is adequately protected by a state cause of action.

Note, supra, 43 Fordham L. Rev. at 441. In the present case, for reasons discussed infra, we find that plaintiff has failed to demonstrate that the creation of a civil cause of action under either § 1341 or § 1343 is appropriate.

In the first place, plaintiff has made no showing whatsoever that creation of a civil remedy under these penal statutes is necessary "to insure the full effectiveness" which Congress had intended for them. In our long experience, we have observed that the United States Attorney has vigorously prosecuted violations of these statutes in instances where knowledge of such violations are brought to his attention. While a decision regarding whether or not to prosecute an alleged violation of §§ 1341 and 1343 remains within the sound discretion of the prosecutor, Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 379-81 (2 Cir. 1973), we do not doubt that serious consideration



will be given to all alleged violations of criminal statutes which are made known to him. Furthermore, we do not find that the interest of this plaintiff falls within the class of interests which the statute is intended to protect. As we have noted supra, the purpose of §§ 1341 and 1343 is to preserve the integrity of the mail and wire communication facilities and to protect those instruments from abuse through criminal conduct. Moreover, and perhaps more importantly, the creation of a civil remedy under these penal statutes is unnecessary to protect the interests of this plain-

70k  
tiff. Numerous common law remedies exist to correct the wrongs which Mount alleges <sup>and no valid need</sup> will be served by the creation of civil remedies under these penal statutes. To allow a plaintiff to come into federal court on an essentially common law claim without first having to sustain the requirements of complete diversity is, therefore, unwarranted. Plaintiff makes no showing why such common law actions as conversion and other causes founded upon trespass against chattels; misrepresentation and fraud and deceit; and those causes of action which pertain to the interference with family relations cannot now be invoked to obtain the relief which he seeks.



Cyrs.  
Limit

See, W. Prosser, Law of Torts §§ 14 (trespass to chattels), 15 (conversion), 105-110 (misrepresentation and fraud) and 124 (interference with family relations) (4th ed. 1971). Lastly, we cannot conclude that the type of harm which plaintiff alleges derives from defendant's conduct is of the type which these statutes were intended to forestall. We say this, primarily for the reasons advanced supra, but also because the Congress in enacting §§ 1341 and 1343 intended to prevent the use of communication facilities for criminal purposes and not to afford a means of civil redress.

Our views with regard to the implication of civil remedies from these penal provisions is in accord with those previously expressed by the Tenth and Fifth Circuits. In Oppenheim v. Sterling, 368 F.2d 516, 518-19 (10 Cir. 1966), cert. denied, 386 U.S. 1011 (1967), the court rejected the creation of a civil cause under §§ 1341 and 1342. In Napper v. Anderson, Henley, Shields, Bradford & Pritchard, 500 F.2d 634, 636 (5 Cir. 1974), the court likewise rejected an implied right under § 1343. The Fifth Circuit summarized the holdings of these decisions in the following terms:

In Oppenheim v. Sterling, 1966, 368 F.2d 516, 518-519, the Tenth Circuit held

UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

CHARLES MERRILL MOUNT,  
Plaintiff,

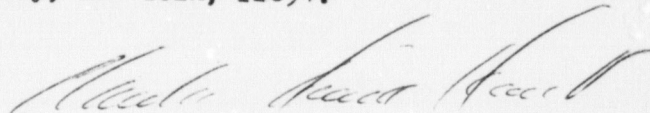
Docket No. 75-7270

-against-

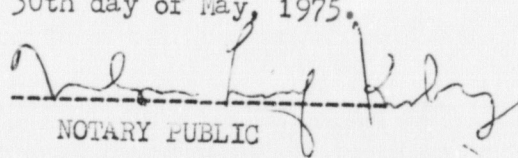
ALLEN HERBERT ARROW, MICHAEL  
WARD STOUT, & JANICE LEACH,  
Defendants.

STATE OF NEW YORK )  
COUNTY OF QUEENS ) ss.:

CHARLES MERRILL MOUNT being duly sworn deposes and says:  
that I have this day duly made service if this APPENDIX upon the  
defendants by their attorneys, Arrow Silverman & Parcher, P.C.,  
1370 Avenue of the Americas, New York, N.Y., 10019, by entrusting  
it in a sealed envelope properly addressed and with sufficient  
postage abd placing same in an official United States Post Office  
depository box in Neponsit, Queens County, New York, 11694.

  
CHARLES MERRILL MOUNT

Sworn to before me this  
30th day of May, 1975.

  
NOTARY PUBLIC

MARILYN LIEF KRAMBERG  
NOTARY PUBLIC, State of New York  
Qual. in Queens Co. No. 41-4504764  
Commission Expires March 30, 1977